For the reasons above, we are of the view that the appeal should be dismissed with costs, and we accordingly so order. The deposit will be paid out to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Murphy & Dunbar.*

ALLIANCE (MALAYA) ENGINEERING CO. SDN. BHD. v. SAN DEVELOPMENT SDN. BHD.

[F.C. (Azmi L.P., Lee Hun Hoe C.J. (Borneo) and Gill C.J. (Malaya) May 31, 1974]
[Kuching — Federal Court Civil Appeal No. 146 of 1973]

Practice and Procedure — Application for summary judgment — Sham defence — Leave to defend conditional upon payment into court of amount of plaintiffs' claim — R.S.C., 1957, O. 14, O. 19 rr. 19 & 27, O. 21 r. 1 & O. 25 r. 4.

In this case the appellants who were nominated sub-contractors had brought an action for $150,000 against the respondents for works carried out by them under the sub-contract. The appellants obtained judgment by default of defence but subsequently the respondents applied for the judgment to be set aside and obtained leave to defend the action. They then filed their defence together with a set-off and a counter-claim.

The appellants thereupon applied for the defence to be struck out on the grounds that the defence disclosed no reasonable defence and that the defence was frivolous and vexatious. This application was dismissed. The appellants then applied again for summary judgment against the respondents but the learned trial judge came to the conclusion that there were triable issues so as to entitle the respondents to unconditional leave to defend and he dismissed the application. The appellants appealed to the Federal Court.

Held: allowing the appeal, as in this case the defence put up by the respondents was a sham defence and there was very little substance in the respondents' claim to a right of set-off and counter-claim the learned trial judge should have granted the respondents leave to defend conditional upon their paying into court the amount of the applicants' claim.

Cases referred to:-

(1) *Dombey & Son* v. *Playfair* [1897] 1 Q.B. 368.
(2) *Anglo-Italian Bank* v. *Wells* 38 L.T.R. 197, 199.
(3) *Wallingford* v. *Mutual Society* 5 App. Cas. 685.
(4) *Ray* v. *Barker* 4 Ex.D. 283.
(5) *Shurmur* v. *Young* 5 T.L.R. 155.
(6) *Jacobs* v. *Booth's Distillery Co.* 85 L.T. 262.
(7) *Syn Lee & Co. Ltd.* v. *Bank of China* [1961] M.L.J. 87.
(8) *Cho Chin Huat* v. *Lee Boo Hock* [1970] 1 M.L.J. 112.
(9) *Lagos* v. *Grunwaldt* [1910] 1 K.B. 41.
(10) *Symon & Co.* v. *Palmer's Stores* [1912] 1 K.B. 259.
(11) *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (Malaysia) Bhd.* [1972] 1 M.L.J. 168.
(12) *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223.
(13) *Jaeger Co. Ltd.* v. *Prof. Dr. Jaeger* [1929] 46 R.P. 336.
(14) *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86.
(15) *Dawnays Ltd.* v. *F.G. Minter Ltd.* [1971] 2 All E.R. 1389.
(16) *Frederick Mark Ltd.* v. *Schild* Times 21 October 1971; Solicitors Journal, 17.12.1971.
(17) *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.* [1972] 1 M.L.J. 75.
(18) *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.* [1973] 3 All E.R. 195.
(19) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 419.
(20) *Tio Chee Hing* v. *Tractors Malaysia Bhd.* [1973] 1 M.L.J. 66.

FEDERAL COURT.

S. F. Chong (*Mrs. Vohra* with him) for the appellants.

Patrick Tan for the respondents.

Gill C.J. (Malaya): This is an appeal by the plaintiffs in the action against the dismissal by B. T. H. Lee J. of their application in the High Court at Kuching for summary judgment against the defendants under Order 14 of the Rules of the Supreme Court, 1957.

The application included a prayer in the alternative that the defendants' defence be struck out (a) under RSC Order 21, rule 1 as being a mere denial, or (b) under RSC Order 25, rule 4 on the ground that it disclosed no reasonable answer and was frivolous and vexatious, or (c) under RSC Order 19, rule 19 on the ground that it was evasive and did not answer the point of substance, or (d) under RSC Order 19, rule 27 on the ground that it tended to prejudice, embarrass or delay the fair trial of the action, or (e) under the inherent jurisdiction of the court on the ground that it disclosed no reasonable defence, that it was frivolous and vexatious and that it was an abuse of the process of the court. The application under the prayers in the alternative was also dismissed.

The facts leading to the action out of which this appeal has arisen are as follows. By an agreement dated 27th January 1966 the defendants contracted to build for the Sarawak Government Phase I of a General Hospital in Kuching. By two agreements dated 21st March 1967 the plaintiffs became the nominated sub-contractors of the defendants for the supply and installation of kitchen and medical equipment respectively for the proposed General Hospital Building. The value of the works for the supply and installation of the kitchen equipment was $287,058 and that of the medical equipment was $540,510, making a total of $827,568 under the two nominated sub-contracts.

Clause 6 of each of the sub-contracts provided for the nominated sub-contractor, after the signing of the sub-contract and within 7 days of the receipt by him of a written notice from the contractor, to proceed with all reasonable despatch to execute and complete the nominated sub-contract works or the representative sections thereof within the period or respective periods specified in Part II of the Schedule to the sub-contract. There was a proviso to clause 6 of the agreement in the following terms:

"Provided that the nominated sub-contractor shall pay to the contractor as liquidated damages $5000/- per week for loss suffered and incurred by the contractor due to the failure of the nominated sub-contractor to complete within the said period or respective periods....."

Clause 7 of the agreement provided for the nominated sub-contractor, within a reasonable time after the receipt by him of the contractor's instructions, to make good all defects, shrinkages or other faults in the nominated sub-contract works which the contractor (whether at his own costs or not) was liable to make

good under the main contract. The proviso to this clause of the agreement was as follows:

"Provided that where the contractor is liable to make good such defects shrinkages or other faults but not at his own costs then the contractor shall secure a similar benefit to the nominated sub-contractor for any money actually received by him in respect of the same."

Under clause 10 of the agreement the defendants as the main contractors agreed, subject to and in accordance with the main contract, from time to time to apply to the Director of Public Works for certificates of payments of the amount which at the date of the application fairly represented the value of the nominated sub-contract works, and within 14 days of the receipt by them of such certificates as aforesaid to pay to the nominated sub-contractors the amounts certified to be due in respect of the nominated sub-contract works and any authorised variations thereof less the due proportion of retention money (10%) retained by the employer.

Clause 12 of each of the agreements provided for the contractor's right to deductions or set-off in the following words:

"The contractor shall notwithstanding anything in this nominated sub-contract contained be entitled to deduct from or set off against any money due from him to the nominated contractor (inclusive of any retention money) any sum or sums for which the nominated sub-contractor is liable to the contractor under this nominated sub-contract whether for damages or otherwise."

The plaintiffs proceeded to execute and complete the work of supplying and installing the kitchen and medical equipment at the hospital building. In respect of the work done by them the Sarawak Government made payments to the defendants from time to time presumably on interim certificates issued by the Director of Public Works. The first payment of $22,500 was made on 2nd April 1968. By 8th September 1970, on which date the defendants received a sum of $450,000, the Sarawak Government had paid the defendants a total of $827,568, leaving a balance of $58,330 which sum they paid direct to the plaintiffs on 14th August 1971. The total amount of $827,568 had been certified as correct by Messrs. Wobferstan Trower & Partners, Singapore, the Quantity Surveyors of the said building project. Although the defendants had received from the Sarawak Government a total sum of $769,238 in respect of works performed by the plaintiffs in execution of the sub-contracts under the two agreements, they had paid the plaintiffs only $485,074 leaving in their hands a balance of $311,164 which belonged to the plaintiffs.

On 19th October 1970 the Director of Public Works, Sarawak wrote a letter to the plaintiffs' solicitors as follows:

"Re: New Sarawak General Hospital, Kitchen and Medical Equipment.

Thank you for your letters of the 19th September and 9th October, 1970.

2. I shall be pleased to expedite payment to your client from moneys outstanding to Messrs. San Development but unfortunately these moneys include only an amount for retention and variations to the contract which are unresolved at present. Retention moneys cannot be released until the completion of the Defects Liability Period. The balance of moneys outstanding due to Messrs. San Development will not be equivalent to Messrs. Alliance's claim. At the end of the Defects Liability period, 31st May, 1971, Messrs. Alliance may receive payment in full subject to the amount deducted from Messrs. San Development for defects if Messrs. San Development fail to rectify the defects. Until that time partial payment only can be initiated when the variations are resolved.

3. In answer to your second question it is not my intention to invoke the Liquidated & Ascertained Damages clauses on any contractor, major or sub-contractor to the contract."

On 5th November 1970 the plaintiffs' solicitors wrote a letter to the defendants' solicitors as follows:

"Re: New Sarawak General Hospital, Kitchen and Medical Equipment.

We refer to your letter of 30th October, 1970 and in answer to paragraph 2 thereof we have to inform you that the defects were put right by our clients upon being informed thereof and we enclose herewith xerox copy of a letter dated 16th October, 1970 from your clients to our clients together with a xerox copy of our clients' reply dated 20th October, 1970 informing them that the faults have been rectified.

With regard to paragraph 3 and the allegation that the authorities are claiming liquidated damages, we enclose a xerox copy of a letter which we have received from the Director of Public Works dated 19th October, 1970, in the third paragraph of which he is making it perfectly clear that he is not making any claim for liquidated damages. Although the Director of Public Works intimated that he is prepared to meet our clients' claim our clients are not prepared to wait until 31st May, 1971 for settlement thereof.

Your clients have no basis whatsoever for withholding final payment to our clients and unless the outstanding balance due to our clients $311,164/- is paid to our clients within 7 days from the date hereof our clients will charge interest thereon at the prevailing bank rate until settlement is received. Please also note that unless the balance is paid in the time stated we intend to instruct our agents in Kuching to issue a writ."

On 12th November 1970 the defendants' solicitors replied to the plaintiffs' solicitors as follows:

"Re: New Sarawak General Hospital, Kitchen and Medical Equipment.

We refer to your letter dated 5th April, 1970 (wrongly stated as 5th April instead of 5th November) upon which we have our clients' instructions to reply thereto.

With regard to paragraph 2 of your said letter and referring to the letter dated 19th October, 1970 from the Director of Public Works, Sarawak addressed to yourself, you will appreciate that that understanding if it may be so called, is hardly sufficient to protect our clients nor was it given to our clients.

Our clients instruct us that quite apart from the liquidated damages, overhead expenses resulting from your clients' delay in supplying the equipments are claimable against your clients. We would refer you to previous correspondence between our clients and yours in particular letters dated 15th December, 1969, 2nd March, 1970, 26th March, 1970, 17th April, 1970 and 12th May, 1970.

We have been instructed that on the 6th day of November, 1970 at a meeting between your clients' representative Mr. Yam and our clients' representative Mr. Choy at No. 164, Jalan Tuanku Abdul Rahman, Kuala Lumpur, both parties have arrived at an agreement as to payment. We were instructed that a sum of $150,000/- shall be paid to your clients by end of November, 1970 and the balance by the 15th of December, 1970. Mr. Yam on behalf of your clients agreed to this. In the meantime, the question of liquidated damages and overhead expenses is to be sorted out. Our clients intend to honour this arrangement."

The defendants having failed to pay the sum of $150,000 as promised by their solicitors' letter, the plaintiffs on 22nd December, 1970 commenced an action in the High Court in Borneo at Kuching by

taking out a specially endorsed writ accompanied by a statement of claim. On or about 25th February 1971 the plaintiffs made an application for summary judgment under Order 14 but they did not proceed with it. On 4th March 1971 they obtained judgment by default of defence under RSC Order 27, rule 2. On 14th March 1971 the defendants took out a summons to set aside the judgment for default of defence and obtained leave from the court to defend the action. On 22nd March 1971 the defendants filed their statement of defence together with a set-off and counterclaim. On 13th August 1971 the plaintiffs made an application under RSC Order 14, rule 4 for judgment against the defendants for a sum of $225,164 as against $311,164 in the original claim. Affidavits in support of the application were filed. The application was adjourned into open court for arguments on 4th October 1971. At this stage there was a change of solicitors and the application was abandoned.

On 29th September 1971 the plaintiffs took out another summons for an order that the defence be struck out under RSC Order 21, rule 1 and Order 25, rule 4 on the ground that the defence disclosed no reasonable defence and that the defence was frivolous and vexatious and that there be judgment for the plaintiffs for $269,754 or $184,754 with interest. As I have already stated, the plaintiffs received direct from the Sarawak Government a sum of $58,338 on 14th August 1971. This reduced their claim to $252,834. There was then a sum of $16,920 in the hands of the Sarawak Government as retention money to which the plaintiffs had then become entitled. It was by adding this retention money to the balance of their claim that they asked for judgment in the sum of $269,754, and their application for judgment in the alternative in the sum of $184,754 was made on the basis of the defendants' set-off and counterclaim in the sum of $85,000. This summons was struck out by the court on 4th October 1971 for non-compliance with Order 14, rule 2. On 11th October 1971 the plaintiffs once again took out a summons under Order 21, rule 1 and Order 25, rule 4 for an order to strike out the defence. The court after hearing arguments dismissed the application on the ground that the procedure adopted by the plaintiffs fell short of the requirements of Order 14, rule 1. There was on record an appeal to the Federal Court against this order but it was not pursued.

I have referred to these numerous applications of the plaintiffs because they have been mentioned by the learned trial judge in his judgment in relation to the next and fourth application of the plaintiffs which was dismissed by him and with which we are now concerned. My other reason for mentioning those earlier applications is that the plaintiffs have raised three separate grounds of appeal to the effect that in dealing with the final and fourth application of the plaintiffs the learned trial judge erred in law in taking into consideration the history of the past applications, in taking into account that the appeal to the Federal Court against the order made in the earlier application was abandoned and in concluding that the affidavit of Stanley George Donaldson in support of this fourth application was the same as the affidavit filed in support of a previous application.

The only observation I need make with regard to these three grounds of appeal is that there is nothing in the learned trial judge's judgment to suggest that he was influenced in any way by the past history of the litigation. He certainly did not dismiss the final application of the plaintiffs on the ground that the plaintiffs were not competent to bring it on the ground that their previous and similar applications had been either dismissed or abandoned. The general rule is that where unconditional leave to defend is given without adjudication on the merits, the plaintiff may issue a fresh summons under Order 14 and apply again for leave to enter final judgment. See *Dombey & Son* v. *Playfair*.[1] The fact that the learned trial judge proceeded to hear and eventually determined this final application on the merits shows that he had that rule very much in mind. I must therefore hold that there is no substance in these three grounds of appeal.

To go back to the application out of which this appeal has arisen, it was made on 29th June 1972 and heard on 10th November, 1972 but judgment was not delivered until 19th September 1973. I am constrained to refer to the delay in the delivery of his judgment by the learned trial judge because this has been made a ground of appeal. There is also another ground to the effect that the learned trial judge failed to allow counsel for the plaintiffs any or any sufficient opportunity to submit fully on the merits of the application at the hearing in the open court on 10th November 1972. This latter ground, in my opinion, is without any substance because it is clear from the notes of proceedings that counsel for the parties were allowed to put in written submissions and to elaborate on them in the course of their arguments.

As regards the delay in the delivery of judgment, I must say in fairness to the learned trial judge that there were referred to him two decisions of the Court of Appeal in England on which a decision of this court was based and which were disapproved by the House of Lords in a later case, so that he had to take time to decide whether all those decisions could be reconciled, and he had all the time to hear and dispose of the numerous other cases which were put before him from day to day. All I can do in the circumstances is to express the hope that reserved judgments will in future be delivered without too much delay.

The application for summary judgment was supported by the affidavit of Stanley G. Donaldson, the Managing Director of the plaintiffs' Company. It is stated in his affidavit that at the commencement of the action the defendants were justly and truly indebted to the plaintiffs in the sum of $311,164 for kitchen and medical equipment supplied to the defendants at their request in connection with the building of the Sarawak General Hospital. The affidavit stated further that notwithstanding the denial by the defendants in their statement of defence that payment of the said sum of $311,164 or any sum was owing and due, they had by their solicitors' letter of 12th November 1970 admitted their indebtedness to the plaintiffs and promised to pay $150,000 by the end of November 1970 and the balance by 15th December 1970. It was lastly stated in the

affidavit that the defendants' set-off and counter-claim was an unliquidated demand which must be made the subject of a separate action or arbitration, so that the defendants have no right in law to retain the amount claimed by the plaintiffs.

The application was also supported by the affidavit of John Lo Sie Yin, Assistant Director of Public Works Department, Sarawak in which it was stated that the plaintiffs had satisfactorily executed and completed the work of supplying and installing kitchen and medical equipment and that the defendants had been paid in full the sum of $827,568 being the total value of the works carried out by the plaintiffs. The affidavit set out all the particulars of payment including the last payment of $58,330 made on 14th August 1971 direct to the plaintiffs. It was stated in the last paragraph of the affidavit that the Director of Public Works, Sarawak had no intention of claiming damages against either the defendants or the plaintiffs as was made clear by the Director's letter of 19th October, 1970 to the plaintiffs' solicitors.

In contesting the plaintiffs' application the defendants filed no affidavit, so that they had to rely entirely on what was stated in their statement of defence. In their statement of defence the defendants admitted the two agreements but averred that the kitchen and medical equipment were supplied contrary to the terms of the said agreement. They denied that they owed the sum of $311,164 claimed by the plaintiffs and stated in the alternative that the payment of the said sum or any amount owing was not due. It was also said that the plaintiffs were not entitled to charge interest at the rate of 8 per cent per annum from 1st December 1970 or any interest at all. By way of set-off and counter-claim the defendants pleaded that the plaintiffs were liable to pay them $85,000 as liquidated damages for the delay of 17 weeks in completing the works, at the rate of $5,000 per week.

At the hearing of the application on 10th November 1972 the case for the plaintiffs briefly was that on the face of it the defence was evasive in that the defendants made no attempt to answer the point at issue, that there were no facts disclosed in the defence which could entitled the defendants to defend the action and that the only issue raised by the defendants' pleading was that of the counter-claim. In this connection, it was submitted that no particulars had been furnished for any loss incurred by the defendants, so that the counter-claim was clearly groundless and should be disregarded. It was further said that in any event a counter-claim was not necessarily a defence under Order 14. This submission was backed up by the dictum of Jessel, M.R. in *Anglo-Italian Bank* v. *Wells*[2] to the effect that in the exercise of his discretion it was open to the judge to strike out the counter-claim if in his opinion such set-off or counter-claim could not be conveniently disposed of in the pending action. It was lastly pointed out that there was not a single affidavit before the court in reply to the plaintiffs' application to verify sufficient facts and particulars to show that there was a *bona fide* defence to the action. In this connection, reference was made to *Wallingford* v. *Mutual Society*,[3] *Ray* v. *Barker*[4] and *Shurmur* v. *Young*.[5] Reference was also made to the well-known case of *Jacobs* v. *Booth's Distillery Co.*,[6] and there was cited to the court the following passage from the judgment of Lord Chancellor (Halsbury):

> "There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

In a nutshell the case for the plaintiffs was that for a period of almost two years they had been unjustly kept out of money to which they were rightly entitled, that the defendants had no valid defence to the plaintiffs' claim and that the only issue which they could be said to have raised on their pleadings was that they were entitled to a set-off to the extent of $85,000 by way of damages for the delay on the part of the plaintiffs to execute their works under the two contracts.

It was submitted on behalf of the defendants that the plaintiffs were estopped from bringing their fourth application for leave to sign final judgment after the previous applications had been either abandoned or dismissed. In this connection it was pointed out that the issues raised by this application had already been determined by the judge in his ruling delivered on 29th March 1972 and reference was made to the written submissions submitted to the court on the occasion of the hearing of that application on 13th December 1971. It was further submitted that the defence had raised various triable issues so that on the authority of *Syn Lee & Co. Ltd.* v. *Bank of China*[7] and *Cho Chin Huat* v. *Lee Boo Hock*[8] the defendants were entitled to unconditional leave to defend. Reference was made to *Lagos* v. *Grunwaldt*[9] and *Symon & Co.* v. *Palmer's Stores*[10] presumably in an attempt to show that the affidavits filed in support of the application for the purpose of verifying the cause of action were made by persons other than the plaintiffs who could not swear positively to the facts. As regards the counter-claim, it was submitted that it was part of the case and based on the same facts and the agreements. The case of *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (Malaysia) Bhd.*[11] was cited. It was pointed out that notwithstanding the letter from the Director of Public Works to say that the Government did not intend to claim any damages from either the contractor or the sub-contractor, the defendants could maintain their counter-claim under clause 12 of the two agreements with the plaintiffs. As regards the failure of the defendants to file an affidavit in reply, reference was made to the case of *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.*[12] On the same point counsel for the defendants stated from the bar that he was not in a position to make any affidavit in reply as none of the defendants' officers dealing with the matter was available. It was lastly submitted that even if judgment was to be entered against the defendants it should be only for the amount of the plaintiffs' claim less the sum of $16,920 as retention money and the sum of $85,000 in respect of the set-off and counter-claim.

In his lengthy submissions in reply to the submissions by counsel for the defendants, counsel for the plaintiffs submitted that the plaintiffs were not estopped from making their fourth application and that the matter was not *res judicata*. In this connection reference was made to the case of *Jaeger Co. Ltd.* v. *Prof. Dr. G. Jaeger*[13] and *Lee Sem Yoong* v. *Leong Yoong*.[14] As regards the defendants' set-off and counter-claim, reference was made to the decision of the English Court of Appeal in *Dawnays Ltd.* v. *F. G. Minter Ltd.*[15] which was followed by the same court in the later case of *Frederick Mark Ltd.* v. *Schild*[16] reported in the Times on 21 October 1971 (also reported in the Solicitors' Journal of 17th December, 1971). Both these cases were considered and approved by this court in *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.*[17].

Having considered the facts of the case and the submissions of counsel, the learned trial judge came to the conclusion that there were triable issues so as to entitle the defendants to unconditional leave to defend. As regards the counter-claim, he ruled that the case of *Dawnays* v. *F. G. Minter Ltd.* was no longer to be regarded as good law in the light of the decision of the House of Lords in *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.*[18] As regards the prayers in the alternative for the defence to be struck out, he referred to the observations of Fletcher Moulton L.J. in *Dyson* v. *Attorney-General*[19] that "difference of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in Chambers", and he also referred to the recent decision of this court in *Tio Chee Hing* v. *Tractors Malaysia Berhad*.[20] In the result he found that there was neither substance nor merit in any of the grounds on which the defence was sought to be struck out and therefore dismissed the plaintiffs' application with costs.

The plaintiffs have raised a number of grounds in support of their appeal to this court. I have already dealt with some of them. I do not consider it necessary to deal at length with the grounds in relation to the dismissal of the alternative prayers in the application for summary judgment as it is clear that a decision thereon was unnecessary once leave was granted to the plaintiffs to enter final judgment or the defendants were given unconditional leave to defend. To that extent I agree with the appellants' contention that the learned trial judge erred in law in applying the observations of Fletcher Moulten L.J. in *Dyson* v. *Attorney-General* to the circumstances of this case. I say this because the main application of the appellants was the application to enter final judgment.

The other grounds of appeal, except the one in relation to the set-off and counter-claim to which I shall come later, boil down to the simple proposition that the learned trial judge erred in law in holding that the defendants had raised triable issues in relation to the whole of the plaintiffs' claim.

It would seem clear from the affidavits and the exhibits thereto filed in support of the application that the plaintiffs had made out a *prima facie* case. Once that was done the onus shifted to the defendants to show cause why judgment should not be entered against them. They could do this by an affidavit in answer, otherwise than by an affidavit or by a preliminary objection. There was clearly no basis for any preliminary objection to this fourth application of the plaintiffs. The defendants did not choose to show cause by affidavit, which is the normal practice. This left them with the third alternative to show cause "otherwise" than by affidavit, for example, by serving, before the issue of the summons, a full and *bona fide* defence setting out obviously triable issues. It was on this third alternative mode of showing cause that the defendants relied. The question therefore is whether they had made a full and *bona fide* defence which set out obviously triable issues.

Now what did they say in their defence, apart from their alleged claim to a set-off and counter-claim in the sum of $85,000 being liquidated damages for the delay in completing the works stipulated in the two sub-contract agreements? They said that the kitchen and medical equipment were supplied contrary to the terms of the said agreements, but it was not stated in what way such supply was contrary to the terms of the agreements, and there was nothing said about it in their counter-claim apart from repeating paragraph 1 of the statement of defence. In paragraph 2 of their statement of defence they stated that the sum of $311,164 was not due. Again it was not stated why it was not due, especially in the light of the overwhelming evidence that the work had been completed and the money had become due and payable more than two years before the date of the application. Their claim for the set-off certainly did not exceed the plaintiffs' claim. The truth would appear to be that, apart from the set-off and counter-claim, the defence was nothing more than a sham defence. The amount of the debt had been ascertained. It was notified to the defendants and practically admitted by them. In the circumstances, any defence to the action, except for the set-off, could only be offered for the purpose of delay. Taking all the facts of the case into consideration, the only triable issue before the court was whether the defendants were entitled to set off their claim for liquidated damages against the plaintiffs' claim.

That brings me to the only other ground of appeal which is to the effect that the learned trial judge erred in law in regarding the House of Lords' decision in *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.* as a precedent binding on him and failing to take into account the decision of this court in *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.* to the contrary. It is to be observed that the decision of this court in the *Bandar Raya* case was based substantially on *Dawnay's* case. That was a case in which the main contractors under a building contract for an office building claimed that, because of delay by the nominated sub-contractors in doing steel work properly, completion of the building under the main contract had been held up and they had suffered loss. The sub-contractors sued the main contractors for the sum of £27,870 being their money held by the main contractors and later took out a summons under RSC Order 14. The main contractors put in an affidavit setting out their cross-claim for the loss suffered

by them on account of the delay on the part of the sub-contractors. For this they relied on clause 13 of the sub-contract which provided that notwithstanding anything in the sub-contract, the main contractor was entitled to deduct from or off-set against any money due from him to the sub-contractors any sum or sums which the sub-contractor was liable to pay to the main contractor under the sub-contract. It was held by the Court of Appeal that since the main contractors' cross-claim for damages for delay was challenged and had not been quantified, it did not come within Clause 13 of the sub-contract. *Dawnay's* case, however, was disapproved by the House of Lords in *Gilbert Ash (Northern) Limited* v. *Modern Engineering (Bristol) Limited* in which it was held that the common law right of a defendant to a set-off could only be taken away by clear, unequivocal words. Although this decision of the House of Lords was not binding on the learned trial judge, I do not think he was wrong in following it. I must therefore reject this ground of appeal.

It would seem clear from what I have said that the defendants had no defence to the plaintiffs' claim except to the extent of their set-off and counter-claim in respect of the alleged damages for the delay. I do not think it would be proper for this court to express an opinion as to whether this set-off and counter-claim is likely to succeed, although it is abundantly clear that the defendants themselves did not have to pay any damages to the Sarawak Government for the alleged delay. Indeed, it was conceded by the defendants that even if judgment were to be entered against them it should only be for the amount of the plaintiffs' claim less the sum of $16,920 as retention money and the sum of $85,000 in respect of their set-off and counter-claim. I do not think the retention money can be taken into account at this late stage. In all the circumstances of the case, I do not think it was right for the learned trial judge to have dismissed the plaintiffs' application for summary judgment. The proper order for him to make was to sign judgment for the amount of the claim less the amount of the set-off and counter-claim and to allow the defendants unconditional leave to defend as regards the balance of the claim. The other order which he could properly have made was to grant the defendants leave to defend conditional upon their paying into court the amount of the plaintiffs' claim.

In the final analysis, the matter before the learned trial judge was fairly simple. Assuming that he took the view that the defendants had raised some sort of triable issues, the question which he had then to consider was whether he should grant the defendants unconditional or conditional leave to defend. As I have already stated, the defence put up by the defendants was a sham defence. There was clearly very little substance in the defendants' claim to a right of set-off and counter-claim in respect of the alleged damages for the delay in the completion of the works. It should therefore have been looked upon with considerable suspicion as to its *bona fides*. In the circumstances, the learned trial judge should have granted the defendants leave to defend conditional upon their paying into court the amount of the plaintiffs' claim.

For the reasons I have stated, I would allow this appeal with costs, set aside the order made by the learned trial judge and substitute in its place an order that the defendants do have leave to defend the action conditional upon their paying into court the sum of $269,754 within 14 days from the date of this order, failing which the plaintiffs do have liberty to sign judgment of that amount. I would also make a further order that in the event of the defendants paying the money into court, the action be set down for trial in priority.

Azmi L.P. and **Lee Hun Hoe C.J. (Borneo)** concurred.

Appeal allowed.

Solicitors: *Chong Bros.; Yong & Co.*

LIM YOKE FOO v. PUN TAT MENG

[O.C.J. (Pawan Ahmad J.) June 6, 1974]
[Kuala Lumpur — Civil Suit No. 89 of 1974]

Practice and Procedure — Application to set aside judgment in default of appearance — Merits of application — Licensee of land — Defendant claims plaintiff estopped from claiming that defendant is a trespasser.

This was an application to set aside a judgment obtained by the plaintiff in default of appearance by the defendant. The affidavit of the defendant alleged that as the previous owners had no objection to his entry upon the plaintiff's land, and as he had incurred considerable expenditure in building on the land in expectation of being allowed to stay as long as he liked, he was a licensee and the plaintiff was estopped from alleging he was a trespasser. The plaintiff's argument was that the defendant was a bare licensee whose licence had been terminated by a notice to quit.

Held: as the defendant entered the land neither as a result of a mistaken belief that it was his land nor at the invitation or with the consent of the owner, and following *Gurbachan Singh* v. *Sharikat Bakti Ltd.*(8) the defendant being a bare licensee, this application failed.

Cases referred to:-

(1) *Sir J.W. Ramsden, Bart* v. *Lee Dyson and Joseph Thornton* (1866) L.R. 1 H.L. 129, 140.
(2) *Plimmer and Anor.* v. *The Mayor, Councillors and Citizens of the City of Wellington* [1884] 9 A.C. 699.
(3) *Inwards & Ors.* v. *Baker* [1965] 1 All E.R. 446, 448.
(4) *Hopgood* v. *Brown* [1955] 1 All E.R. 550, 559.
(5) *Ward* v. *Kirkland* [1966] 1 All E.R. 609, 624.
(6) *E.R. Ives Investments Ltd.* v. *High* [1967] 1 All E.R. 504, 507.
(7) *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.
(8) *Gurbachan Singh* v. *Sharikat Bakti Ltd.* [1967] 1 M.L.J. 235.

CIVIL SUIT.

Ronald Khoo for the plaintiff.

Tee Keng Hoon for the defendant.

Pawan Ahmad J.: This is an application by the defendant to set aside an order of court dated February 26, 1974 in which judgment was entered in default of appearance against the defendant. This application made by Summons-in-Chambers is dated April 8, 1974 and is supported by two affidavits of Pun Tat Meng dated March 8, 1974 (enclosure 11) and March 18, 1974 (enclosure 13) respectively.